In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-825

MERCY N. CLINCHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners are seven American Indians who are, or were, employed by the United States on Indian Reservations. After *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, in which the Court held that the State of Arizona could not tax income earned by Indians on their reservations in the State, petitioners brought this suit in the Court of Claims to recover from the United States moneys that had been withheld by the United States from their wages prior to *McClanahan*, and paid over either to the State of Montana or to the State of Arizona pursuant to 5 U.S.C. 5517 for income taxes claimed by the States. Petitioners had not previously protested the withholding and have made no attempt to recover these moneys from the States of Arizona or Montana (Pet. App. A 8a). No funds withheld after *McClanahan* are at issue.[1]

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[1]After that decision, the withholdings ceased (Pet. App. A 2a).

The United States interpleaded the States of Arizona and Montana as parties defendant (Pet. App. A 2a, see against the states under state law and that petitioners' we rely (Pet. App. A), granted the government's motion for summary judgment and dismissed the third party claim against the two States. The court took note of this Court's decision in *McClanahan* but found that under Arizona and Montana law a private employer would not be liable for income taxes erroneously withheld from an employee's wages and paid to the State (Pet. App. A 4a-6a). The employee's remedy would be against the state which received the withheld moneys (*id.* at 6a-8a). The court concluded that Congress, in enacting 5 U.S.C. 5517, did not impose a greater burden on the United States than that imposed by local law on private employers (*id.* at 5a-6a), that petitioners must bring their action against the states under state law and that petitioners' remedy would then be in a state administrative proceeding (*id.* at 7a-8a).

This conclusion is fully supported by the language of 5 U.S.C. 5517(b), particularly since that subsection specifically provides that nothing in Section 5517 gives consent to application of a statute imposing a "penalty or liability on the United States" as a result of its withholding of wages for state taxes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

FEBRUARY 1975.